SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/07/2002 CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

CV 2002-008667

FILED: _____

GAILE PERRY DIXON ANDREW M HULL

v.

ROGER A MCKEE ROGER A MCKEE
4748 N 10TH PLACE
PHOENIX AZ 85014-3615

PHX JUSTICE CT-E2
REMAND DESK CV-CCC

MINUTE ENTRY

This court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument on August 12, 2002, and the Court has reviewed the memoranda submitted by the parties.

This Court has considered the record of the proceedings from the Phoenix City Court, the exhibits made of record, and the Memoranda submitted by the parties.

1. Factual and Legal Background

The parties initially entered into a residential rental agreement for a term between October 17, 2000 to October 17,

2001, with a one-year extension to October 17, 2002. On or about April 1, 2002, the Appellant failed to pay his April monthly rent. He was then served a five (5) day Notice pursuant to A.R.S. § 33-1368(B) and failed to pay rent within the five day period.

At a Special Detainer hearing on April 15, 2002, in the East Phoenix No. 2 Justice Court, the Appellant appeared and admitted that he had not paid rent and a judgment was entered against the Appellant. From that decision Appellant filed this timely appeal.

The Appellant raises three issues on appeal. First, the Appellant argues that the tape of the hearing transmitted to the Superior Court is inadequate and insufficient and is grounds for reversal of the judgment and a trial de novo. Second, Appellant argues that the failure of the Justice Court to conduct a "trial" as required by statute, A.R.S. § 12-1177 is ground for reversal because it denied him due process. Third, the Appellant argues that the five (5) day Notice required by the statute was defective, and, therefore, voids the Special Detainer Action.

Standard of Review

Appellant challenges the sufficiency of the evidence to support the judgment. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[1] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[2] If conflicts in

[1] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v.Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).
[2] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict against the Appellant.[3] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[4] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[5] The Arizona Supreme Court has explained in ***State v. Tison***[6] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[7]

2. Discussion

First, Appellant argues that the tape of the hearing transmitted to the Superior Court is inadequate and insufficient and is grounds for reversal of the judgment and a trial de novo should be granted. This appeal is governed by the Arizona Superior Court Rules of Appellate Procedure. Rule 1(b) of these

[3] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[4] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[5] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[6] Tison, 129 Ariz. at 546.
[7] Id. At 553, 633 P.2d at 362.

rules mandates that all appeals from a justice court be based on the record from that court. The rule further provides that any party who had an opportunity to request production of a verbatim record of the justice court proceedings, but failed to do so, shall not be granted a trial de novo. Furthermore, requisite fees for copying and certifying the record must be borne by the appellant.[8] Appellant has offered no support on his claim that he is entitled to a trial de novo. Moreover, Appellant cites to A.R.S. § 12-1181(A) which he believes supports his claim that the Superior Court should either proceed with a trial de novo or reverse the judgment. A.R.S. § 12-1181(A) generally discusses damages for withholding the possession of the premises during pendancy of the appeal. It does not speak to the elements of a trial de novo. All of Appellant's claimed errors are unsupported by the record. In fact, Appellant had the opportunity to submit the transcript and request a copy of the recording of the trial in this case and failed to do so. Appellant is not entitled to a *Trial de Novo*, and, more importantly, in the absence of evidence to the contrary, this Court must presume that an absent record would support the trial court's determination and judgment.

Second, the Appellant argues that failure of the Justice Court to conduct a "trial" as required by A.R.S. § 12-1177 is grounds for reversal because it denied him due process. Appellant argues in his memoranda that § 12-1177 requires that the "...Justice of the Peace shall conduct a trial...."[9] Arizona law, A.R.S. § 12-1177(A) states that "On the trial of an action of forcible entry or detainer, the only issue shall the *right of possession* and the merits of the title shall not be inquired into." (emphasis added). Therefore, the only question before the Justice Court was which party would have the "right of possession." If the defendant failed to pay his rent then the owner/landlord would have the right of possession. Appellant's memoranda states that he had not paid his rent when asked by the Justice Court. Therefore, the trial court ruled appropriately based upon Appellant's admissions. Appellant also argues that

[8] Arizona Superior Court Rules of Procedure - Civil, Rule 11(a)(2).
[9] Appellant's Memoranda p. 7

the lower court should have heard him on the issue of offering to pay the rent during the forcible detainer trial. As a matter of law, the only issue that can be raised at a forcible detainer trial is the "right of actual possession, and the merits of title shall not be inquired into."[10] This court finds that the trial court's decision not to hear Appellant was proper.

The Appellant further argues that since he was not offered a "trial" he was denied due process as required under Arizona law and the Fourteenth Amendment. Section 12-1177 is clear regarding what is required at trial for a forcible detainer. The Appellant was charged with not paying his rent. The owner/landlord availed herself to pursue her rights and took Appellant to court to regain the "right of possession" of the townhouse. Appellant did not pay the rent as required by the rental agreement and he did not pay it within the proscribed five day period. Since the trial court appropriately applied the statute, the Appellant's right to due process was not denied. Furthermore, the Appellant makes no claim to which right under the 14th Amendment he has been denied and he does not offer any case law to support his assertion that his rights have been violated. None of the acts to which the Appellant objects have "abridge[d] [his] privileges or immunities [as a] citizens of the United States" or deprived him of "life, liberty, or property."

Third, the Appellant argues that the five (5) day Notice required by statute was defective and therefore voids the Special Detainer action. Arizona law, A.R.S. § 33-1368(B) provides in pertinent part:

> If rent is unpaid when due and the tenant fails to pay rent within five days after written notice by the landlord of nonpayment and the landlord's intention to terminate the rental agreement if the rent

[10] A.R.S. §12-1177(a); See *Curtis v. Morris*, 184 Ariz. 393, 909 P.2d 460 (App. 1995); See also, *Gangadean v. Erickson*, 17 Ariz. App. 131, 495 P.2d 1338. (App. 1972).

> is not paid within that period of time, the landlord may terminate the rental agreement by filing a special detainer action...[11]

Here, the landlord gave the Appellant a five (5) day Notice that clearly indicated that the landlord would take further action in pursuit of her rights through the court. Listing the bankruptcy court on the Notice as the court in which Appellee would pursue her rights is not a material error that would result in the Notice being defective and thus void. Moreover, the Notice offered the Appellant an opportunity to resolve this matter by contacting the landlord immediately. Apparently, the Appellant did not avail himself of such an opportunity and the landlord filed the Special Detainer action. This court finds that the Notice was not defective and therefore valid.

IT IS THEREFORE ORDERED affirming the judgment in this matter.

IT IS FURTHER ORDERED remanding this case back for all future proceedings to the Phoenix Justice Court, except for attorney's fees and costs on appeal.

IT IS FURTHER ORDERED that counsel for Appellee submit an application and affidavit of attorney's fees and costs on appeal, and a form of judgment no later than November 22, 2002.

[11] A.R.S. § 33 - 1368(B).